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No. 06-1505 4-11-08

IN THE

Supreme Court of the United States

CLIFFORD B. MEACHAM, *et al.*,
Petitioners,

v.

KNOLLS ATOMIC POWER LABORATORY, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICI CURIAE* OF EQUAL EMPLOYMENT ADVISORY COUNCIL, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, AND SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF RESPONDENTS

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The Equal Employment Advisory Council, the National Federation of Independent Business, and the Society for Human Resource Management respectfully submit this brief as *amici curiae*. The brief supports the position of Respondents before this Court in favor of affirmance.[1]

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 300 major U.S. corporations. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and practices. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The National Federation of Independent Business (NFIB) is the nation's leading small-business advocacy association, with offices in Washington, DC and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. To fulfill this role as the voice for small business, the NFIB frequently files *amicus* briefs in cases that will impact small businesses nationwide.

The Society for Human Resource Management (SHRM) is the world's largest association devoted to human resource management. Representing more than 225,000 individual members, SHRM's mission is to serve the needs of HR professionals by providing the most essential and comprehensive resources avail-

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to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

able. As an influential voice, SHRM's mission is also to advance the human resource profession to ensure that HR is recognized as an essential partner in developing and executing organizational strategy. Founded in 1948, SHRM currently has more than 550 affiliated chapters and members in over 100 countries.

Amici's members are employers or representatives of employers that are subject to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, and other federal employment-related laws and regulations. As potential defendants to claims under these laws, *amici's* members have a direct and ongoing interest in the question before the Court regarding which party bears the burden of proof as to whether an employment decision that has adverse impact against older workers is justified by "reasonable factors other than age." Relying on this Court's decision in *Smith v. City of Jackson, Miss.*, 544 U.S. 228 (2005), the Second Circuit ruled correctly that in a disparate impact action brought under the ADEA, the defendant employer need only produce a legitimate business justification for the employment practice that has caused the disparity. Once it has done so, the plaintiff bears the burden of proving the justification is unreasonable. Pet. App. 11a-19a.

Because of their interest in matters of this nature, EEAC, NFIB and/or SHRM have filed *amicus curiae* briefs in a number of cases before this Court involving the application and scope of the ADEA, including *Sprint/United Management Corp. v. Mendelsohn*, __ U.S. __, 128 S. Ct. 1140 (2008); *Smith v. City of Jackson, Miss.*, 544 U.S. 228 (2005); *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581 (2004); *Adams v. Florida Power Corp.*, 535 U.S. 228

(2002); *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993); *Wards Cove Packing Co. v. Atonio*, 493 U.S. 802 (1989); *Public Employees Retirement System v. Betts*, 492 U.S. 158 (1989); *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985), and *Shell Oil v. Dartt*, 434 U.S. 98 (1977). Given their significant experience, *amici* are well-situated to brief the Court on the practical, business ramifications of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Knolls Atomic Power Laboratory ("KAPL" or the "Laboratory") manages and operates a government-owned nuclear research and development facility under a contract with the Department of Energy (DOE). Pet. App. 37a. It is funded jointly by the DOE and the U.S. Navy's Nuclear Propulsion Program. *Id.* at 5a.

In 1996, as a result of a reduction by the government of its annual staffing level, KAPL was forced to eliminate 108 positions. *Id.* at 38a. At the same time, however, it was required to hire thirty-five new employees needed to perform additional government work involving highly specialized skills it determined were lacking among existing employees. Brief of Respondent at 3. In all, the Laboratory was forced to eliminate a total of 143 existing positions in order to hire thirty-five new staff members while remaining within the government-prescribed staffing limit. Pet. App. 38a. To that end, KAPL offered employees with at least twenty years of service the opportunity to participate in a voluntary severance incentive program, which ultimately resulted in an overall net reduction of 107 positions. *Id.* at 39a. The remaining job cuts were made pursuant to an involuntary reduction-in-force (RIF). *Id.* at 39a-40a.

The selection criteria utilized in the RIF were reviewed and approved by the Department of Energy, Brief of Respondent at 3, and the process was analyzed by KAPL's General Manager and its general counsel to ensure it was fair and appropriate. Pet. App. 6a. In addition, a Review Board independently assessed each manager's selection decisions "to assure adherence to downsizing principles as well as minimal impact on the business and employees." *Id.* In all, thirty-one out of 245 employees were selected for layoff, thirty of whom were over age forty. Brief of Respondents at 11.

Twenty-eight of the terminated employees filed an action in the United States District Court for the Northern District of New York, accusing KAPL, its general manager John Freeh, and its parent corporation Lockheed Martin of both disparate treatment and disparate impact discrimination in violation of the ADEA. *Id.*; Pet. App. 75a. The case was tried to a jury, which returned a verdict for the defendants on the disparate treatment allegations and for the plaintiffs on the disparate impact claims. Pet. App. 75a-76a.

The defendants appealed to the Second Circuit, which affirmed liability on the disparate impact claims, and subsequently the defendants petitioned for a writ of certiorari. Pet. App. 4a. Shortly thereafter, the Court ruled in *Smith v. City of Jackson* that while disparate impact causes of action are available under the ADEA, Title VII's business necessity test is inapplicable in the age discrimination context. Pet. App. 5a. Based on its decision in *Smith*, the Court granted the defendants' petition, vacated the Second Circuit's ruling, and remanded the case for further proceedings. *Id.*

On remand, the Second Circuit in a 2-1 decision ruled for the defendants. The panel majority concluded that once the plaintiffs in an ADEA disparate impact claim have identified a specific practice responsible for the disparity, the employer need only produce a legitimate business justification for that practice. Pet. App. 11a-21a. It therefore vacated the judgment of the district court, and remanded the case for an entry of judgment in favor of the defendants. *Id.* at 21a.

The plaintiffs petitioned for a writ of certiorari, which this Court granted on January 18, 2008.

SUMMARY OF ARGUMENT

The panel majority below ruled properly that in order to prevail on a claim of disparate impact discrimination under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, stemming from the application of a facially neutral employment practice, a plaintiff must prove the challenged practice is unreasonable. As this Court made clear in *Smith v. City of Jackson*, ADEA disparate impact actions are to be narrowly construed.

The question of who bears the burden of demonstrating an employment practice is unreasonable under the ADEA is of great importance to corporate America, which is committed to ensuring the highest standards of quality and, to that end, regularly reexamines the manner in which it conducts business. These companies rarely approach difficult decisions to restructure their businesses or to eliminate personnel without having carefully analyzed the issues and taken steps to minimize any negative consequences to their employees or the larger community. Especially in the case of reductions-in-force necessitated

by circumstances beyond an individual employer's control, these legitimate business decisions should be presumed valid, unless proven by the plaintiff challenging them to be unreasonable.

The combination of deteriorating economic conditions and an aging workforce could lead to a period of time during which older workers as a group are disproportionately impacted by layoffs, through no improper intent on their employers' part. Requiring employers to defend the reasonableness of their legitimate business decisions will encourage any older worker affected by a reduction-in-force or corporate restructuring to pursue ADEA disparate impact litigation, most likely on a collective basis, the costs and negative publicity of which could have a devastating impact on both large and small employers.

ARGUMENT

I. REQUIRING EMPLOYERS WHO ALREADY HAVE DEMONSTRATED A LEGITIMATE BUSINESS JUSTIFICATION TO ALSO PROVE THE REASONABLENESS OF THEIR WORKFORCE REDUCTION AND CORPORATE RESTRUCTURING DECISIONS WILL SIGNIFICANTLY AFFECT THEIR ABILITY TO COMPETE IN TODAY'S FAST-PACED BUSINESS ENVIRONMENT

The Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual . . . because of such individual's age." 29 U.S.C. § 623(a). Section 623(f)(1) of the ADEA further provides, however, that "[i]t shall not be unlawful for

an employer . . . to take any action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age . . . ." 29 U.S.C. § 623(f)(1).

In *Smith v. City of Jackson, Miss.*, this Court held that disparate impact causes of action are available under the ADEA, but that employment actions resulting in age disparities will not be unlawful if based on "reasonable factors other than age." 544 U.S. 228, 240-41 (2005). While the Court in *Smith* did not address directly the parties' respective burdens of proof and persuasion in an ADEA disparate impact case, as Respondents' brief points out, given the important textual and practical differences between the ADEA and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, the Second Circuit logically concluded based on *Smith* that plaintiffs in an ADEA disparate impact case bear the burden of proving a challenged employment practice is unreasonable and thus unlawful under the Act. Pet. App. 11a-19a.

The question of who bears the burden of demonstrating an employment practice is reasonable or unreasonable under the ADEA has significant implications for the business community. As U.S. companies continue to face economic challenges and global competition, they are compelled to consistently reexamine their business models and strategies in order to remain competitive. Such reexaminations often result in workforce changes that are fully justified by legitimate business needs.

Companies rarely approach the difficult decisions to restructure their businesses or to eliminate personnel without having carefully analyzed the issues and taken steps to minimize any negative consequences to their employees or their communities. Es-

pecially in the case of reductions-in-force necessitated by circumstances beyond an individual employer's control, these legitimate business decisions should be presumed valid, unless proven by the plaintiff to be unreasonable.

This is particularly true in the context of decisions having an adverse impact on older workers. As this Court observed both in *Hazen Paper v. Biggins*, 507 U.S. 604 (1993) and more recently in *Smith v. City of Jackson, Miss.*, 544 U.S. 228 (2005), age often is correlated to legitimate criteria routinely used by employers as a means of differentiating among employees. Ordinary aging and career advancement patterns tend to result in older workers as a group holding higher-level, better-paid, and longer-established positions of employment than their younger counterparts. Career longevity also naturally leads to a differentiation between older and younger workers with respect to the level of skills, experience, and ability they bring to the job.

Because of these natural correlations, many business decisions and practices, even though age-neutral in intent, tend to impact older workers differently than younger ones. Some of these decisions and practices work to the older workers' advantage; others tend to benefit younger workers. Examples of the latter could include workforce reductions designed to cut salary and benefit costs; business restructurings designed to make organizations less top-heavy; plant-closings and relocations of operations accompanied by significant personnel turnover; changes in product lines, technologies and methods of operation that require workers with new or different skills; and salary adjustments designed to improve hiring and

retention of employees in entry-level and relatively low-level positions.

When an employment practice is challenged as having an adverse impact on older workers under the ADEA, the employer must produce evidence, under *Ward's Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), that the practice is based on non-age factors. Once it has done so, logic dictates that the employee challenging the employment practice then must prove the practice is unreasonable. Placing upon the employer the burden of showing "reasonableness" is akin to obligating it, in a disparate treatment case, to show its legitimate, nondiscriminatory justification for an employment action is not a pretext for unlawful discrimination. Of course, the law imposes no such obligation, as doing so would relieve the plaintiff of the ultimate burden of proving discrimination.

Shifting the burden of proving reasonableness to the employer, rather than placing on the employee the burden of proving unreasonableness, thus would lead to incongruous results that are inconsistent with established principles of law. It also would lead to considerable confusion among employers as to what additional evidence they must offer to prove a challenged employment practice is reasonable, despite already having articulated a legitimate justification.

KAPL was required, as a result of the government's action in reducing its staffing level for 1996, to eliminate over 100 positions. In order to service new government programs requiring cutting-edge technologies, however, KAPL determined that its current workforce did not possess the requisite specialized skills and thus would need to be supplemented with additional personnel. Brief of Respondent at 3. Had

it not done so, KAPL would not have been in a position to perform the work as well or as quickly, which might have jeopardized its ability to secure similarly-advanced work in the future.

The approach KAPL took in making the tough business decisions it faced was eminently reasonable. Not only did the Laboratory turn to the Department of Energy for guidance, but it also studied and applied industry best practice in developing its strategy for effectuating the necessary job cuts. Brief of Respondent at 4. It provided written guidance and training to managers responsible for making individual termination decisions and subjected those determinations to additional scrutiny by a Review Board. In short, KAPL took the steps necessary to ensure that its RIF decision rested on legitimate business factors other than age.

Requiring KAPL or any other employer to prove that its non-age based business justification for a resulting disparity is reasonable, rather than to require the plaintiff to prove the stated reason is unreasonable, would impose an additional burden that is inconsistent with the purpose and intent of the ADEA. It also would place companies at a competitive disadvantage in an ever-increasingly global business environment, especially in times of economic decline and uncertainty, where they regularly are faced with making tough business decisions in order to remain viable.

II. RELIEVING PLAINTIFFS OF THE BURDEN OF PROVING THAT A CHALLENGED EMPLOYMENT PRACTICE IS UNREASONABLE WILL ENCOURAGE ADEA DISPARATE IMPACT LITIGATION

In addition, relieving employees challenging the legality of an employment practice that has an disparate impact on older workers of the burden of proving the employer's stated justification is unreasonable likely would lead to a substantial increase in ADEA disparate impact class-based litigation, at least some of which would be intended solely to pressure businesses to settle out of court.

The ADEA incorporates the enforcement scheme of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*, which permits "any one or more employees for and in behalf of himself or themselves and other employees similarly situated" to file suit to recover damages for an alleged violation of the Act. 29 U.S.C. § 216(b). A plaintiff asserting class-based claims under the ADEA is not required to satisfy the threshold requirements of Rule 23 of the Federal Rules of Civil Procedure, and will be permitted to bring a "collective" action on behalf of all employees "similarly situated." *See, e.g., Ruehl v. Viacom, Inc.*, 500 F.3d 375, 379 (3d Cir. 2007).

Given these less rigorous procedural requirements, at the moment such an action is filed, ADEA plaintiffs gain a tactical advantage over employers who invariably will face substantial defense costs and potentially damaging publicity as a result of the mere allegation of discrimination. Requiring plaintiffs to prove that an employment practice having adverse impact on older workers is unreasonable would discourage the use of the ADEA collective action proce-

dure as a tactic for negotiating large settlements and would minimize the filing of frivolous lawsuits.[2]

In 2008, the Administration on Aging published 2006 statistics on older Americans, which showed, among other things, that the population of persons age 65 and older living in the U.S. increased nearly 10% since 1996 to 37.3 million people, who "represented 12.4% of the U.S. population, about one in every eight Americans." Administration on Aging, U.S. Dep't of Health & Human Servs., *Statistics, A Profile of Older Americans: 2007* (Feb. 11, 2008).[3]

Experts expect this number to continue to increase, with the U.S. Bureau of the Census estimating a total population of 40 million older persons in 2010 and nearly 55 million in 2020.[4] In addition, a

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[2] Despite Petitioners' assertions to the contrary, placing the burden on plaintiffs in an ADEA disparate impact case to plead and ultimately prove that the challenged employment action is unreasonable would not require "second sight" on their part. *See* Brief *Amici Curiae* AARP, *et al.*, at 21. In *Bell Atlantic Corp. v. Twombly*, this Court said, "we do not require heightened fact pleadings of specifics, but only enough facts to state a claim to relief that is plausible on its face." 127 S. Ct. 1955, 1974 (2005). It ruled that factual allegations contained in a civil complaint "must be enough to raise a right to relief above the speculative level" in order to survive a motion to dismiss. *Id.* at 1965. Never has it been suggested that the plaintiffs' burden ultimately to prove unreasonableness in the ADEA disparate impact context would, or could, arise unless and until the employer articulated a legitimate business justification for the challenged practice.

[3] *Available at* http://www.aoa.gov/PROF/Statistics/profile/2007/3.asp.

[4] *See* Administration on Aging, U.S. Dep't of Health & Human Servs., *Table, Older Population by Age: 1900 to 2050* (June 23, 2005), *available at* http://www.aoa.gov/prof/Statistics/online_stat_data/AgePop2050.asp.

January 2008 U.S. Bureau of Labor Statistics report suggests that older workers are remaining on the job longer than in previous years. *See generally* Murray Gendell, *Older Workers: Increasing Their Labor Force Participation and Hours of Work*, 131 Monthly Lab. Rev. 41-54 (Jan. 2008).

As the U.S. workforce continues to age, and a declining economy forces more employers to undergo layoffs and restructurings, it is inevitable that older workers will be impacted. It also is likely that the number of ADEA collective actions will increase. Placing the burden on employers of proving their corporate layoff decisions were based on "reasonable factors other than age"—instead of more logically on the employee or employees challenging the practice as discriminatory and thus *per se* unreasonable—will encourage even more ADEA disparate impact litigation.

And the increase in ADEA disparate impact litigation, which in most cases likely will proceed on a collective basis, invariably will lead to the "blackmail value" discussed in the Title VII class action context "that can aid the plaintiffs in coercing the defendant into a settlement." *Rutstein v. Avis Rent-A-Car Sys.*, 211 F.3d 1228, 1241 n.21 (11th Cir. 2000). Indeed, companies facing substantial defense costs and potential class-based liability for ADEA disparate impact discrimination "may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle." *In re Rhone-Poulenc Rorer*, 51 F.3d 1293, 1298 (7th Cir. 1995) (citations omitted).

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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